FOR ARGUMENT

(9)

No. 89-1322

In The

Supreme Court of the United States

October Term, 1990

Oklahoma Tax Commission,

Petitioner,

v.

The Citizen Band Potawatomi
Indian Tribe of Oklahoma,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE SENECA-CAYUGA TRIBE OF OKLAHOMA, WYANDOTTE TRIBE OF OKLAHOMA, PAWNEE INDIAN TRIBE OF OKLAHOMA, OTOE-MISSOURIA TRIBE OF OKLAHOMA, PONCA TRIBE OF INDIANS OF OKLAHOMA, KAW INDIAN TRIBE OF OKLAHOMA, TONKAWA TRIBE OF INDIANS OF OKLAHOMA, AND KIOWA, COMANCHE AND APACHE INTERTRIBAL LAND USE COMMITTEE IN SUPPORT OF RESPONDENT

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No. 89-1322

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SUPREME COURT OF THE UNITED STATES
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OKLAHOMA TAX COMMISSION, Petitioner,

v.

THE CITIZEN BAND POTAWATOMI
INDIAN TRIBE OF OKLAHOMA, Respondent.

BRIEF OF AMICI CURIAE TRIBES IN SUPPORT OF RESPONDENT

CONSENT TO FILING

Both parties have consented to the filing of this brief. Letters of consent have been lodged with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The amici are all federally recognized Indian tribes (and one intertribal organization) which occupy federally-owned tribal trust lands within the State of Oklahoma. The tribes exercise a broad range of self-governing powers within these lands and are engaged in various forms of economic development activities that generate revenues used to provide tribal programs and services for their members. These efforts are fully consistent

with current federal Indian policies, which seek to promote and foster tribal self-government through economic self-sufficiency. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-18 and ns. 19 and 20 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983).

Certain positions advanced by the Oklahoma Tax Commission in this case would seriously threaten the attainment of these important national goals. In particular, the Tax Commission contends that federally-owned tribal trust land in Oklahoma is "off-reservation" land and should be subject to complete state jurisdiction. In addition, the Commission urges this Court to abandon the long-recognized doctrine of tribal sovereign immunity from unconsented suit.

These results would be contrary to the established precedents of this Court and to the policies and expectations of Congress. As a result, the amici tribes have a substantial interest in opposing the State's wide-ranging attack on tribal self-government in Oklahoma by means of this amicus brief.

SUMMARY OF ARGUMENT

The Tenth Circuit was correct in holding that the tribal trust land of the Potawatomi Tribe is "Indian Country" within the meaning of 18 U.S.C. §1151(a). That statute defines "Indian Country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government. . . ." Under well established precedents of this Court and an unbroken line of authority from the Tenth Circuit, which has extensive experience in dealing with Oklahoma Indian land issues, federally-owned tribal trust land in Oklahoma is a reservation for purposes of Indian Country status. The argument of the Oklahoma Tax Commission that the trust land of the Potawatomi Tribe is "off-reservation" land, and therefore subject to complete state jurisdiction, is based upon faulty legal and historical analysis and should be rejected by this Court.

The Court should also reject the State's invitation to overturn the doctrine of tribal sovereign immunity from unconsented suit. Both Congress and the federal courts have long recognized that Indian tribes may not be sued absent an explicit congressional or tribal waiver of that immunity. Because that principle is inextricably tied to federal Indian policies promoting tribal autonomy and economic self-sufficiency, any weakening of that doctrine would have very serious consequences for tribal governments across the country. As a result, any decision to diminish the scope of tribal sovereign immunity from suit should be left to Congress. In the absence of such congressional determination, this Court should affirm the judgment of the court below dismissing the Tax Commission's counterclaim against the Potawatomi Tribe.

ARGUMENT

I. TRIBAL TRUST LAND IN OKLAHOMA IS A "RESERVATION" AND THEREFORE "INDIAN COUNTRY" AS DEFINED AT 18 U.S.C. §1151(a)

Central to much of the State's argument in this case is the contention that the activities of the Potawatomi Tribe at issue here occurred "off the reservation." The State's repeated references to and discussion of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and its efforts to distinguish *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), are all predicated on the assumption that the Potawatomi tribal land held in trust by the United States in this case does not constitute a "reservation" for jurisdictional purposes.[1]

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[1] In those companion cases, the Court set forth two broad principles of federal Indian law: that state laws generally are not applicable to tribal activities on an Indian reservation except to the extent that Congress has expressly authorized the application of state law, *McClanahan*; but that a tribal enterprise conducted off the reservation may be subject to non-discriminatory state taxation. *Mescalero*.

Although the Tax Commission never says so directly, the importance of the "on-reservation" versus "off-reservation" distinction is to determine whether the Potawatomi tribal lands are "Indian Country." That term, as defined at 18 U.S.C. §1151(a), includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government. . ." and applies to questions of both criminal and civil jurisdiction. *California v. Cabazon Band*, 480 U.S. at 207, n.5. Indian Country generally denotes those areas within which federal and tribal jurisdiction are paramount, and state authority is extremely limited or non-existent. *See generally DeCoteau v. District County Court*, 420 U.S. 425, 427 and n.2 (1975). Therefore, in determining the extent of the State's regulatory authority in this case, the threshold question is whether or not the tribal trust land on which the Potawatomi Tribe is conducting its activities is an Indian reservation within the meaning of §1151(a), and, hence, Indian Country.

A. An Unbroken Line of Authority From This Court and the Tenth Circuit Has Held That Land Set Apart by the United States and Held in Trust for an Indian Tribe is a Reservation for Indian Country Purposes Under §1151(a).

Not surprisingly, the State has not cited or discussed a single case which analyzes the scope of Indian Country under §1151(a). The reason for this glaring omission is obvious, however. The most cursory review of the case law from this Court and from the Tenth Circuit Court of Appeals quickly reveals that land held in trust by the United States for the benefit of a federally recognized Indian tribe, however it may otherwise be designated, constitutes a "reservation" for purposes of §1151(a).

This is not to suggest that the term "Indian reservation" has had one fixed or immutable meaning through time or for all purposes. In fact, the leading treatise on federal Indian law devotes four pages to discussing the origin, development and

different usages of the term over time and in different contexts. Felix Cohen's *Handbook of Federal Indian Law*, 34-38 (1982 ed.) (hereafter "Cohen"). Whatever its historical roots, however, there is now general agreement that the term "Indian reservation" as used in §1151(a) simply means land validly set apart for the use of Indians under the authority of the federal government, regardless of how the land achieved that status. *See United States v. John*, 437 U.S. 634, 648-49 (1978) (quoting *United States v. Pelican*, 232 U.S. 442, 449 [1914]); Cohen at 34 and n.66.

It is immaterial that the word "reservation" may not have been used when the land at issue here was set apart for tribal use by the United States. This Court so concluded more than fifty years ago in *United States v. McGowan*, 302 U.S. 535, 538-39 (1938). In that case, the Court determined the status of a small tract of land purchased by the federal government and held in trust for homeless Nevada Indians. The land had never been formally designated as a "reservation" by Congress, but instead was characterized as the "Reno Indian Colony." The Supreme Court rejected the argument that the land was not Indian Country because it had never been expressly set aside as a "reservation." Instead, the Court held:

> Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as 'reservations' . . . and it is immaterial whether Congress designates a settlement as a 'reservation' or 'colony.'

Id. As a result, the Court concluded that "it is not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian Country.'" *Id.* at 539.

Forty years later, the Court reached a similar conclusion in *United States v. John*, 437 U.S. 634 (1978). In that case, this Court reversed a judgment of the Mississippi Supreme Court and ruled that certain land held in trust by the federal government for the Mississippi Band of Choctaw Indians was a

"reservation" within the meaning of §1151(a), despite the lack of a formal designation as such by Congress. The Court relied on *McGowan* and *United States v. Pelican*, 232 U.S. 442 (1914), in which reservation status had been based on a finding that the subject lands "had been validly set apart for the use of the Indians, as such, under the superintendence of the Government." *Id.* at 449. As a result, the Court in *John* found that the land held in trust for the Mississippi Choctaws, as a federally recognized Indian tribe, was a "reservation" and therefore "Indian Country" under §1151(a).

In addition to these cases, the Tenth Circuit Court of Appeals has repeatedly held that tribal trust lands in Oklahoma are Indian reservations for purpose of §1151(a). The court of appeals did so first in *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 666-68 (10th Cir. 1980), primarily on the strength of *United States v. John*. In that case, the court held that lands set apart and held in trust for the tribe under a variety of different federal statutes all constituted Indian Country under §1151(a). More recently, the Tenth Circuit has subjected the question to even more rigorous analysis, and reached the same conclusion in a case involving the petitioner here. *Indian Country, U.S.A. v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987), *cert. denied* _____ U.S. ___, 108 S.Ct. 2870 (1988).

In *Indian Country U.S.A.*, the Creek Nation of Oklahoma and an affiliated company sought declaratory and injunctive relief against the Oklahoma Tax Commission. The Commission alleged that it had complete jurisdiction over a Creek tribal bingo enterprise being conducted on Creek lands, including the right to tax and regulate the tribal games. The State argued that the tribal activities were not being conducted within Indian Country, or, alternatively, that even if they were, the State had complete jurisdiction nevertheless.

The appellate court rejected both arguments. In so doing, it carefully analyzed the scope, history and purpose of §1151(a), and the cases of this Court that have interpreted it. 829 F.2d

at 973-76. After doing so, the court of appeals had no difficulty in finding that the tribal lands at issue in that case were Indian Country under §1151(a), as having been set apart by the federal government for the use and benefit of the Creek Nation.

As a result, the State's argument that the present case is controlled by *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) is without merit. That case generally held that tribal activities occurring off the reservation may be subject to state taxation. However, as just discussed, that is not the case here. In *Mescalero*, the land on which the tribe had constructed its ski resort was outside of the tribe's reservation boundaries, and was simply leased from the U. S. Forest Service under a 30 year lease. *Id.* at 146 (land was "adjacent to the reservation"). In addition, there is no indication that the tribe exercised governmental authority over that leased land. Although not acquired in trust for the tribe, the Court summarily concluded that this lease arrangement was sufficient to bring the tribe's interest in that land within the immunity afforded by 25 U.S.C. §465. The Court then held that §465, which has no relevance to the case at bar, did not exempt the tribe's income, derived from that off-reservation leased land, from state taxation. Beyond this cursory analysis, however, the Court made no effort to define the status of the leased land. In particular, the Court did not determine whether the land was "Indian Country" because §465 does not use that term or require that finding.

By way of contrast, the land at issue in this case is actually set apart and held by the United States in trust for the Potawatomi Tribe, and lies within the tribe's historical reservation boundaries.

As these cases amply demonstrate, then, the State is simply ignoring well-established precedent when it argues that the Potawatomi tribal activities at issue in this case should be regarded as "off-reservation" activities for jurisdictional purposes. In fact, these tribal trust lands plainly constitute a reservation and Indian Country under 18 U.S.C. §1151(a), and the court below was correct in so holding.

B. The State's Argument Concerning The Supposed Disestablishment of All Indian Reservations in Oklahoma is Unpersuasive and Incorrect.

To buttress its argument for state jurisdiction over all Indian lands in Oklahoma, the Tax Commission devotes a substantial portion of its brief to the contention that all Indian reservations in Oklahoma had been disestablished and all tribal lands brought under state jurisdiction by the time of Oklahoma's admission to the Union. Tax Commission's Brief at 9-21.

This very argument has been rejected by the Tenth Circuit, after careful analysis, in two recent cases. *Indian Country, U.S.A.*, 829 F.2d at 976-81; *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 712 and n.2 (10th Cir. 1989). The State's disestablishment argument is unpersuasive for several other reasons, as well. First, and perhaps most simply, it is contrary to Congress' clearly expressed intent. The State's assertion that "Congress has since recognized that no reservations survived past statehood," Tax Commission's Brief at 17-18, is best repudiated through Congress' own words. In 1936, Congress enacted the Oklahoma Indian Welfare Act (OIWA) 25 U.S.C. §501 *et seq.*, to specifically address the status of Oklahoma tribes. That statute, passed approximately 30 years after the State alleges that all reservations in Oklahoma had been terminated, authorized the Secretary of the Interior:

> . . . to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands *within or without existing Indian reservations*, including trust or otherwise restricted lands now in Indian ownership . . . .

25 U.S.C. §501 (emphasis added). It seems difficult to understand why Congress would have referred to "existing Indian reservations" in 1936 if all reservations had been eliminated before 1906. The reason, of course, is that all

reservations in Oklahoma had *not* been terminated, and Congress clearly understood that fact.

The Tax Commission has cited legislative history of the OIWA to support a contrary conclusion. Like much of the State's authority, however, it is fatally flawed. The State cites and quotes from S. Rep. No. 1232, 74th Cong. 1st Sess. (1935), which, it says, is the Senate Report accompanying the Oklahoma Indian Welfare Act of 1936. Tax Commission's Brief at 18. However, that Report did *not* accompany the OIWA. In fact, it was the Report on an earlier version of the legislation that was rejected by Congress. It was in the next session of Congress that the OIWA was enacted, and in H. Rep. No. 2408, 74th Cong. 2d Sess. (1936), which deals with the enacted version, there is a discussion of the problems in the earlier version and the intent of Congress in enacting the version that it did. In this later Report, it is stated:

> During the last session of Congress the Committee on Indian Affairs had before it H. R. 6234, a bill similar in purpose but containing many objectionable features. The Senate bill, as passed by the Senate on August 16, 1935, embodied some of the objectionable provisions. The committee has therefore devoted considerable time to a study of the legislation satisfactory to the Indians, to the Department, and to the Congress itself. This bill, in its revised form, has the endorsement of the Department; it has been advocated by representatives of numerous Indian groups; it is unanimously favored by the Oklahoma delegation in the House, and was unanimously reported by your committee.

The Report continued:

> Sections 3, 4, and 5 extend to the Oklahoma Indians the right to organize; to adopt constitutions; to receive charters; and to participate in loan funds and

> otherwise to enjoy the benefits of organization for general welfare purposes. In other words, these sections will permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act of June 18, 1934.

From this commentary it is apparent that Congress intended the Indian tribes of Oklahoma to enjoy the same general status as tribes elsewhere in the United States; a status that, by definition, requires a secure land base over which the tribe can exercise governmental authority. It would have been a hollow gesture, at best, for Congress to have extended powers of tribal organization and self-government to Oklahoma tribes under the OIWA, but for them to be denied that authority and be fully subject to state jurisdiction because their trust lands failed to constitute "Indian Country." By specifically designating them as "reservations" in the statute, it is clear that Congress fully intended to avoid the result proposed by the Tax Commission in this case.

Second, the State's argument is irrelevant. As this Court has noted, disestablishment of reservation boundaries primarily affects the jurisdictional status of *non-Indian* owned lands within the reservation; tribal lands and trust lands within the original boundaries retain their "Indian Country" character despite disestablishment. *Solem v. Bartlett*, 465 U.S. 463, 467, n.8 (1984); *DeCoteau v. District County Court*, 420 U.S. at 428. This Court has never held that lands currently held in trust by the United States for an Indian tribe within the boundaries of a disestablished or diminished reservation are subject to state jurisdiction.

The Tenth Circuit, with substantial experience in dealing with Oklahoma Indian law issues, has followed the same line of reasoning. *Indian Country, U.S.A.*, 829 F.2d at 975, n.3. So, too, in *Cheyenne-Arapaho Tribes v. State of Oklahoma*, the court of appeals presumed that the original reservation may have been disestablished by congressional action. 618 F.2d at 667.

Nevertheless, the court found that lands within the original reservation boundaries which were now held in trust for the tribes, retained their reservation status for purposes of §1151(a). *Id.* at 668.

The same principle applies here. It makes no difference in this case whether the original Potawatomi Reservation was disestablished or diminished. If the lands on which the current tribal activities are taking place are within the boundaries of the original reservation (which they are) and if those lands are presently held in trust by the United States for the Potawatomi Tribe (which they are) those lands retain their Indian Country status under §1151(a), and are not subject to general state jurisdiction.

The State's reliance upon, and the conclusion it draws from, the Dawes Commission Reports are also unwarranted. These were reports *to* Congress, not reports *by* Congress. Therefore, they are of very limited value in attempting to ascertain what Congress actually did insofar as any particular reservation is concerned.

In addition, the reports were simply wrong to the extent that they advised Congress that one result of the Dawes Commission's activities had been the abolition of all tribal governments within the Indian Territory. Such a view has been specifically rejected both by contemporary federal courts, *Harjo v. Kleppe*, 420 F.Supp. 1110 (D.D.C. 1976) *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C.Cir. 1978), and by authoritative Indian law commentators. Cohen at 779-80, 781-84.

As a result, the State's position here that "the allotment of the land and the effacement of the tribal governments were successfully obtained," and that "the [Dawes] Commission had accomplished the reconstruction of the Territory in order to replace the several tribal governments with a constitutional state government," Tax Commission's Brief at 15, must be viewed merely as wishful thinking rather than legal reality. In fact, the "evidence" relied upon here by the Tax Commission fails to

establish that all Oklahoma reservations and tribal governments, including those of the Potawatomi Tribe, have ever been terminated.

To support its unprecedented position here, the Tax Commission also suggests that Oklahoma Indian tribes are entitled to less federal protection than other tribes because Oklahoma Indians have ostensibly been assimilated into the non-Indian population. Tax Commission's Brief at 18-21.

The Court has already rejected this very argument in *United States v. John*, 437 U.S. 634 (1978). In that case, as here, the state argued that because "the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State," *id.* at 652, they were not entitled to federal protection and were fully subject to state law. The Court disagreed, and held that continued federal recognition of the tribe as a tribe, rather than the degree to which individual members may or may not be assimilated into the non-Indian community, determines the extent to which federal and tribal, rather than state, jurisdiction applies on tribal trust land. *Id.* In addition, as was the case in *John*, the record before this Court is absolutely devoid of any persuasive evidence whatsoever to establish the "fact" that the Potawatomi Tribe, or any other Oklahoma tribe, has been fully assimilated into the non-Indian community, or that Oklahoma Indian tribes are any more or less assimilated than tribes of any other state. Rather than provide empirical evidence, expert testimony or the like, the Tax Commission would have the Court make this far-reaching determination on the basis of several sentences of dicta from *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).[2]

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[2] Cohen discusses *Oklahoma Tax Commission* in the broader judicial context in which it arose, Cohen at 421-24, and concludes that while "the result was not an abrupt change of doctrine . . . the plurality opinion relied on broad reasoning going well beyond the immediate issue." *Id.* at 422. The

Oklahoma Tax Commission, when fairly analyzed, does not support the unprecedented position for which the State cites it here. First, the language quoted by the Tax Commission in its brief did not even command the support of a majority of the Court. Justice Black wrote the plurality opinion, from which the State quoted, for four members of the Court, while an equal number joined the dissent. Justice Douglas concurred in the result and disposition, but without any indication that he adopted the patronizing language upon which the State focuses here.

Equally as important, this language, when read in context, does not support the State's argument in any event. Even given the broadest possible reading, it cannot be said that a majority of the Supreme Court was saying in 1943 that all Indian tribal governments within the State of Oklahoma had ceased to exist as a legal matter. Rather, the Court seemed to be commenting on what it viewed as the dormant and largely inactive state of those governments at that time and for some unspecified period in the past. However, both the plurality and dissenting opinions expressly recognized that the Oklahoma Indian Welfare Act of 1936 was intended and had begun to revitalize Oklahoma tribes. 319 U.S. at 603, n.5 ("under [the OIWA] some progress has been made in the restoration of tribal government"); *id.* at 613, n.1 ("They still exist . . . and have recently been authorized to resume some of their former powers" [citing the OIWA]).

The brief, unflattering description of the status of Oklahoma tribes as of 1943 contained in *Oklahoma Tax*

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question involved in that case concerned the application of state inheritance taxes to the property of individual Indians. The Court's commentary on the status of Oklahoma tribal governments at that time, wholly unsupported by any factual information, was not necessary to decide the issue then before the Court.

Commission is not unlike the well-documented history of the Mississippi Band of Choctaws outlined in *United States v. John*, 437 U.S. at 639-46. As *John* makes clear, however, the facts that an Indian tribe may be only the remnant of a once larger group, that its government may have lain dormant for years, that its members may have been granted state citizenship and that the Bureau of Indian Affairs may have periodically abandoned its supervisory role and permitted a state to exercise unauthorized jurisdiction over the tribe and its property, do not mean that tribal existence has been terminated or that tribal powers, if and when the tribe chooses to exercise them, have been diminished. *Id.* at 652-54. Certainly nothing in the dicta quoted by the State from *Oklahoma Tax Commission* suggests a different result with respect to Oklahoma Indian tribes.

To the contrary, the facts and the legal principles applicable in this case require the conclusion that the Potawatomi lands at issue here are a "reservation" and constitute "Indian Country" within the meaning of 18 U.S.C. §1151(a). If this is so, then the State's reliance on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) and its broader position that all tribal trust land in Oklahoma is "off-reservation" land must also be rejected. Accordingly, that portion of the decision below should be affirmed.

II. THE TAX COMMISSION'S COUNTERCLAIM WAS PROPERLY DISMISSED UNDER THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY FROM SUIT

The Tenth Circuit properly dismissed the Oklahoma Tax Commission's counterclaim seeking affirmative relief against the Potawatomi Tribe. The doctrine of tribal sovereign immunity from unconsented suit is well established in this Court and its validity has been expressly recognized by Congress. The State has offered no compelling reason why this important doctrine should suddenly be abandoned. Moreover, even if the principle of tribal sovereign immunity should be reexamined, that task should be left to Congress, in the exercise of its plenary

authority over Indian affairs.

A. The Potawatomi Tribe, Like All Federally Recognized Tribal Governments, Enjoys Sovereign Immunity From Unconsented Suit

It is a basic tenet of federal Indian law that Indian tribes enjoy sovereign immunity from suit. Just as the United States may not be sued without its consent, *United States v. Testan*, 424 U.S. 399 (1976); *United States v. Sherwood*, 312 U.S. 584 (1941), it is axiomatic that an Indian tribe may not be sued in either federal or state court unless Congress or the tribe consents to such suit, and such consent must be unequivocally expressed. In applying this principle, the court below relied on a long, unbroken line of authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers"); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 171-73 (1977); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 513 (1940); *Turner v. United States*, 248 U.S. 354, 357-58 (1919); *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 714 (10th Cir. 1989); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 492 F. Supp 55 (N.D. Cal. 1979), *aff'd*, 757 F.2d 1047, 1051 (9th Cir. 1985) *rev'd on other grounds*, 474 U.S. 9 (1987); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982); *Ramey Construction Company v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982).

Tribal sovereign immunity from suit is jurisdictional. Absent an effective waiver, the assertion of sovereign immunity by a federally recognized Indian tribe deprives a court of jurisdiction to adjudicate the claim, and the only proper disposition is dismissal of the action. *United States v. United States Fidelity and Guaranty*, 309 U.S. at 512 ("These Indian Nations are exempt from suit without Congressional authorization . . . . Absent that consent, the attempted exercise of judicial power is void"); *see also Puyallup Tribe Inc. v.*

Department of Game, 433 U.S. at 172 ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe").

Tribal sovereign immunity is rooted in the unique historical relationship between Indian tribes and the United States government: tribes are immune from suit because they are sovereigns predating the Constitution and because such immunity is necessary to preserve their autonomous political existence. *Chemehuevi Indian Tribe*, 757 F.2d at 1050-51; *see also United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). Moreover, it has long been held that tribal sovereign immunity is necessary to preserve and protect tribal assets from claims and judgments that would soon deplete tribal resources. *Maryland Casualty Co. v. Citizens National Bank of North Hollywood*, 361 F.2d 517, 521-22 (5th Cir. 1966); *Adams v. Murphy*, 165 F. 304, 308-09 (8th Cir. 1908); *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895); *Cogo v. Central Council of Tlingit and Haida Indians*, 465 F. Supp. 1286 (D. Al. 1979). *See generally Atkinson v. Haldane*, 569 P.2d 151, 157-63 (Alaska, 1977) (discussing public policy bases for tribal sovereign immunity).

Congress has also expressly recognized the doctrine of tribal sovereign immunity. In enacting the Indian Self-Determination Act of 1975, 25 U.S.C. §450 et seq., Congress explicitly stated that nothing in that Act was to be construed as "affecting. modifying, diminishing or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. §450n. The fact that Congress would so clearly state its intention to protect tribal sovereign immunity plainly indicates its belief in the continued validity and importance of this well established principle.

Finally, the policy concerns that underlie tribal sovereign immunity are as relevant today as they have ever been. As succinctly summarized by this Court in its most recent discussion of the subject, "[t]he common law sovereign immunity possessed by the Tribe is *a necessary corollary to Indian sovereignty and*

self-governance. Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 890 (1986) (emphasis added). In short, tribal immunity from suit is not an antiquated doctrine, as suggested by the State, but rather continues to serve important federal Indian policies.

B. Tribal Sovereign Immunity Also Extends to Counterclaims

The Tenth Circuit correctly held that the Potawatomi Tribe's sovereign immunity extends not only to original actions, but also to counterclaims seeking affirmative relief against the tribe. This general principle of sovereign immunity is well established. *Illinois Central Railroad Co. v. Public Utilities Commission*, 245 U.S. 493, 505 (1918); *accord, U. S. v. Shaw*, 309 U.S. 495 (1940). The same principle applies to cross-complaints or counterclaims brought against an Indian tribe. In *United States v. United States Fidelity and Guaranty Co.*, this Court concluded that:

> [p]ossessing this immunity from direct suit, we are of the opinion [that a tribe] possesses similar immunity from cross-suits. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective.

309 U.S. at 513.

Nor can the Tax Commission persuasively argue that Rule 13(a) of the Federal Rules of Civil Procedure, authorizing compulsory counterclaims in civil actions, constitutes a congressional waiver of sovereign immunity. That contention has been repeatedly rejected by a host of federal courts. *United States v. Longo*, 464 F.2d 913 (8th Cir. 1972); *United States v. Wilson*, 523 F. Supp. 874, 900, n.22 (N.D. Iowa, W. D. 1981); *United States v. Drunkwater*, 434 F. Supp. 457, 460 (E.D. Va 1977); *United States v. Edena*, 372 F. Supp. 1317, 1319 (D.S.C. 1974); *see also* 6 C. Wright and A. Miller, *Federal Practice and Procedure*, Civil §1427, p. 139 (1971). As the court below also

noted, it has likewise been rejected in the context of tribal sovereign immunity. *Chemehuevi Indian Tribe*, 757 F.2d at 1053.

Finally, the Tenth Circuit correctly held that the narrow recoupment exception to sovereign immunity, *see Bull v. United States*, 295 U.S. 247, 261 (1935), was inapplicable to this case. The recoupment exception permits a counterclaimant to reduce the amount of money damages sought by the government under certain circumstances, but does not permit an award of affirmative relief against the governmental entity. *United States v. Agnew*, 423 F.2d 513 (9th Cir. 1970); *see also Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967). Where, as here, the tribe's complaint sought only injunctive relief, the recoupment exception cannot be construed to authorize a counterclaim against the Potawatomi Tribe seeking affirmative declaratory or monetary relief.

C. The Enforcement Problems of Which The Tax Commission Complains Are Theoretical At Best And Do Not Warrant Abolishing Tribal Sovereign Immunity

The Tax Commission has invited the Court to overrule the longstanding doctrine of tribal sovereign immunity because, the Commission says, its interest in collecting state taxes by judicial means outweighs the principles of tribal autonomy and self-government that the doctrine protects. Tax Commission's Brief at 27-39. That contention, however, is both speculative and incorrect.

Federal courts, including this Court, have routinely rejected arguments that tribal sovereign immunity should be ignored because of practical problems caused by its enforcement. For example, in *Chemehuevi Indian Tribe v. California State Board of Equalization*, the State of California filed a counterclaim against the tribe seeking monetary relief for unpaid cigarette taxes. In dismissing the state's counterclaim, the district court noted that:

> [t]he Tribe's sovereign immunity might create practical difficulties for the Board in attempting to enforce its cigarette tax laws against the tribe, but these potential enforcement problems cannot override the Tribe's claim of sovereign immunity.

492 F. Supp 55, 61, (N.D. Cal. 1979), *aff'd*, 757 F.2d 1047 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1987).

This Court has taken the same position in other contexts. For example, in *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977) the Court dismissed the state's action against the tribe seeking to regulate tribal fishing activities on the basis of sovereign immunity. In so doing, the Court clearly recognized the practical enforcement problem that its decision to deny the state relief against the tribe would create. Nevertheless, the Court found these considerations to be inadequate to override the tribe's assertion of immunity in that case. *Id.* at 178.

More recently, the Court upheld the doctrine of tribal sovereign immunity against allegations that the State of North Dakota could deny access to its courts unless tribes in that state agreed to waive their immunity from suit. In rejecting this contention, the Court stated:

> The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.

Three Affiliated Tribes v. Wold Engineering, 476 U.S. at 893.

Thus, enforcement problems occasioned by the assertion of tribal sovereign immunity from suit have never been deemed to warrant any impairment of that doctrine.

The Tax Commission further argues that tribal sovereign immunity should be abolished with respect to commercial activities involving a tribe and non-Indians. That assertion also is clearly without merit. *United States v. United States Fidelity and Guaranty Co.*, one of the seminal cases in this area, involved a commercial lawsuit over coal leases between the Choctaw and Chickasaw Tribes and a non-Indian coal company and its surety. Likewise, *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, involved a dispute between the Seminole Tribe and a contractor over a construction project. The Eighth Circuit Court of Appeals held that a limited waiver of tribal sovereign immunity shielded certain tribal assets from garnishment proceedings. In reaching this conclusion, the court noted:

> The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material. It is in such enterprises and transactions that the Indian tribes and the Indians need protection.
>
> * * *
>
> To construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and property of the tribes and the individual Indians.

361 F.2d at 521-22. The fact that the present case involves a commercial venture by the Potawatomi Tribe in no way diminishes its sovereign immunity from unconsented suit.

Finally, even if this Court should decide that the

Potawatomi Tribe must collect state taxes on its sales to non-members, the Tax Commission has failed to show any compelling reason why the principle of tribal sovereign immunity should be abandoned. There is no evidence that the Potawatomi Tribe, or any other Oklahoma tribe, would ignore such a direct ruling by this Court. In addition, the State has alternative means to enforce tribal compliance with any such ruling. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court authorized state seizures of untaxed cigarettes off the reservation, stating that "[b]y seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." *Id.* at 162. There is no evidence before the Court that this enforcement mechanism has not proven adequate in the State of Washington. As a result, the Tax Commission's argument that such seizures, or even the threat of such seizures, would not prove effective in Oklahoma, is entirely speculative. Certainly, the Court should not reverse the longstanding line of authority upholding tribal sovereign immunity, which would have the effect of severely intruding on "core tribal interests," on the basis of such conjecture.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, the Court recognized that tribal immunity from suit, like all other aspects of tribal sovereignty, "is subject to the superior and plenary authority of Congress." *Id.* at 58. To date, Congress has acted to preserve and protect tribal sovereign immunity. 25 U.S.C. §450n. To the extent that the question bears reexamination, it is for Congress and not the judiciary to make that determination. Unless and until Congress acts to diminish this aspect of tribal sovereignty, this Court, like the court below, should uphold the doctrine of tribal sovereign immunity as an essential element of federal Indian law.

CONCLUSION

The Oklahoma Tax Commission is asking the Court to adopt broad, unprecedented positions that go well beyond what

is necessary to decide the narrow tax issue presented in this case. The Tenth Circuit properly decided that the Potawatomi tribal trust land was "Indian Country" under 18 U.S.C. §1151(a) and that the State's counterclaim against the tribe must be dismissed on the basis of tribal sovereign immunity. Those decisions were correct and we respectfully urge that they be affirmed.

Respectfully submitted,

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